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FILED: ERIE COUNTY CLERK 10/05/2021 09:17 AM

NYSCEF DOC. NO. 23

INDEX NO. 805964/2021

RECEIVED NYSCEF: 10/04/2021

At a term of the Supreme Court of the State of New York, held in and for the County of Erie at the Erie County Hall, Buffalo, New York on the 25 day of August, 2021.

PRESENT: Honorable Paul B. Wojtaszek, J.S.C.
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

EGATE-95, LLC,

vs.

FITNESS INTERNATIONAL, LLC,

Petitioner,

ORDER AND JUDGMENT

Index No. 805964/2021

Respondent.

EGATE-95, LLC having petitioned this Court pursuant to Real Property Actions and Proceedings Law Section 711(1), for an Order awarding possession of the commercial premises located at 5089 Transit Road, Clarence, New York and which is more particularly described in the Petition ("Premises"), and upon the Notice of Petition dated May 6, 2021 (NYSCEF Doc No 8) and the Verified Petition with Exhibits, dated May 6, 2021 (NYSCEF Doc Nos 1-7), and Respondent Fitness International, LLC having answered the Petition by its Verified Answer with Affirmative Defenses and Counterclaims dated June 2, 2021 (NYSCEF Doc No 12), and the Petitioner having replied to Respondent's counterclaims by its Verified Reply dated June 2, 2021 (NYSCEF Doc No 13), and

This proceeding having come on to be heard via Microsoft TEAMS on August 25, 2021, Phillips Lytle, LLP (Tristan D. Hujer, Esq., David J. McNamara, Esq., William V. Rossi, Esq., of

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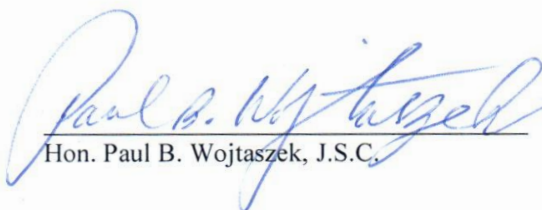
NYSCEF DOC. NO. 23

counsel) on behalf of Petitioner, and Klehr, Harrison, Harvey Branzburg, LLP (A. Grant Phelan, Esq., Mary Ellen O'Laughlin, Esq., of counsel) together with Magavern Magavern Grimm, LLP (Richard A. Grimm, III, Esq. of counsel) on behalf of Respondent, and due deliberation being had thereon, and for the reasons stated in the Court's oral decision on the record, attached as Exhibit A and incorporated herein, it is,

ORDERED and ADJUDGED, that the Petition of EGATE-95, LLC seeking possession of the Premises, shall be and is, hereby denied, without prejudice to EGATE-95, LLC's right to commence a plenary action for monetary damages, and it is further,

ORDERED, that the counterclaims brought by Fitness International, LLC, shall survive the denial of the Petition and may be prosecuted either in this proceeding or severed and maintained in any plenary action commenced by EGATE-95, LLC.

10/1/2021


Hon. Paul B. Wojtaszek, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE : VIRTUAL PROCEEDINGS : PART 16

EGATE-95, LLC,

Petitioner,

-vs-

INDEX NO. 805964/2021

FITNESS INTERNATIONAL, LLC,

Respondent.

25 Delaware Avenue
Buffalo, New York
August 25, 2021

B e f o r e:

HONORABLE PAUL B. WOJTASZEK
Supreme Court Justice

A p p e a r a n c e s:

PHILLIPS LYTTLE LLP
BY: TRISTAN D. HUJER, ESQ.,
DAVID J. McNAMARA, ESQ.,
WILLIAM V. ROSSI, ESQ.,
Appearing for the Petitioner via Teams.

KLEHR HARRISON HARVEY BRANZBURG LLP
BY: A. GRANT PHELAN, ESQ.,
MARY ELLEN O'LAUGHLIN, ESQ.,
Appearing for the Respondent via Teams.

MAGAVERN MAGAVERN GRIMM LLP
BY: RICHARD A. GRIMM III, ESQ.,
Appearing for the Respondent via Teams.

P r e s e n t:

MARK CHAIT, via Teams
ERIC RECOON, via Teams

1 THE CLERK: This is the matter of Egate-95,
2 LLC versus Fitness International, LLC, Index Number
3 805964 of 2021. Please state your appearances for the
4 record.

5 MR. HUJER: Good afternoon, Your Honor.
6 Tristan Hujer from Phillips Lytle for the petitioner,
7 Egate-95, LLC. I'm also with my partner David
8 McNamara, associate William Rossi; and Mark Chait from
9 Benderson Development Company, LLC is also present by
10 video, and I see that Eric Recoon, also from Benderson
11 Development, LLC, is present, I think just maybe with
12 his camera off or maybe by phone. And Benderson, I
13 should add, is managing agent for the Egate property.
14 Thank you for your time today.

15 MR. PHELAN: Good afternoon, Your Honor.
16 Grant Phelan on behalf of the respondent, Fitness
17 International, LLC. With me is Richard Grimm and Mary
18 Ellen O'Laughlin.

19 THE COURT: Good afternoon, counselors. We
20 have had an extensive conversation relative to the
21 parameters of today's proceeding and we discussed the
22 authority for this summary proceeding, and there is
23 disagreement between and among counsel as to their
24 respective positions and rights today.

25 Mr. Hujer, you believe that since there has

1 been no motion, a timely motion to either dismiss the
2 petition or for leave to either supplement or amend
3 their papers, that you have met your burden and that
4 you're entitled to the relief requested, which is
5 possession of the premises that are in dispute.

6 MR. HUJER: That's right, Your Honor.

7 THE COURT: Mr. Phelan, you have argued that
8 the lease itself and the pandemic entitles your client,
9 and you've cited another section of the RPAPL
10 Section 761, which gives your client the right to
11 redemption upon payment of the monies that are
12 outstanding, if they are in fact outstanding, and
13 therefore, you have asked that the Court not rule on
14 the merits of the summary proceeding and give you an
15 opportunity to further brief the issues in dispute and
16 move for summary judgment. Is that somewhat accurate?

17 MR. PHELAN: That is, Your Honor. As you
18 know, we have also asserted seven counterclaims, which
19 I think also need to be addressed. I don't know
20 that -- I don't recall seeing an answer to those. I
21 don't know if the landlord has filed a response, but
22 obviously we believe, based upon some of the arguments
23 that we made off the record and which you alluded to,
24 that our client had a right to abate rent during a
25 discreet period of time last year. We continued to pay

1 rent from September 1st, 2020, through the current term
2 and in fact are current and have paid for the month of
3 August 2021. We believe that the Court's time is
4 better spent deciding what are extremely complicated
5 nuanced arguments on cross-motions for summary
6 judgments.

7 THE COURT: All right. So let me start with
8 you, Mr. Hujer. We did -- well, first of all, is there
9 a response in opposition to the counterclaims?

10 MR. HUJER: Yes, Judge. We filed a reply to
11 the counterclaims, verified on June 2nd of this year.

12 THE COURT: All right.

13 MR. HUJER: And it's Number 13 on the docket.

14 THE COURT: I'm looking at it right now.
15 Verified Reply to Counterclaims?

16 MR. HUJER: That's right.

17 THE COURT: Okay. Mr. Phelan, do you
18 acknowledge receipt of that?

19 MR. PHELAN: You know, Judge, if Mr. Hujer
20 says that he filed it, I don't recall receiving it, but
21 it is quite possible that either my colleague
22 Ms. O'Laughlin or Mr. Grimm received it, and I don't
23 recall seeing it or receiving it, but I'm not gonna
24 question his representation to the Court.

25 THE COURT: Okay. Well, I can tell you that

1 it is e-filed.

2 MR. PHELAN: Okay.

3 THE COURT: And it is on the document list
4 under this index number.

5 So with that, Mr. Hujer, you oppose the
6 request of Mr. Phelan with respect to how we proceed
7 today?

8 MR. HUJER: I do.

9 THE COURT: And you in our off-the-record
10 conversation have cited several cases. Do you -- well,
11 among the cases you cited are some New York Supreme
12 Court cases, one from New York City which you said
13 involved a gym or a fitness club similar to the
14 respondent in this case. It was an Equinox gym in New
15 York City. And then you said a case from California,
16 also cited the case. Do you have any appellate level
17 decisions or Court of Appeals? You also cited a Court
18 of Appeals case.

19 MR. HUJER: I did. The Court of Appeals case
20 was the Kel Kim Corp case. It's 70 N.Y.2d 900. It's
21 from 1987. It stands to bar the impossibility and
22 force majeure arguments that are being made.

23 THE COURT: And that's, of course, more
24 recent than the Benderson case Mr. Phelan cited, 1974
25 from the Fourth Department.

6

1 MR. HUJER: That is. I'll add as well that
2 the Yellowstone case from the Court of Appeals also
3 supercedes this Fourth Department case. I may -- Will
4 Rossi, I may need you to get the full cite, but I see
5 21 N.Y.2d. The pincite is 637.

6 THE COURT: And then you have also argued
7 that what you have set forth today entitles your client
8 to the relief requested and possession of the disputed
9 premises.

10 MR. HUJER: That's right. And I need to just
11 finish my answer, if the Court would allow me, to the
12 appellate level case question.

13 THE COURT: Yeah, go ahead.

14 MR. HUJER: Okay. The -- in the COVID
15 context, the Second Circuit has also -- let me just
16 double-check on this. Well, I wanted to say the Second
17 Circuit. The Southern District in the Gap case has,
18 but these cases also, including the Gap case from the
19 Southern District, rely on cases, among them Kel Kim.

20 THE COURT: So you believe that you have
21 cited appropriate authority that's binding on this
22 Court which compels me to grant your relief and deny
23 the request for any continuance or any further papers
24 from respondent.

25 MR. HUJER: I think to give you -- I want to

1 say yes. I think, Judge, to give you an intellectually
2 honest answer here, when we're dealing with trial court
3 decisions, they are -- we're aware they're a coequal
4 court with you, whether it's State Court or Federal
5 Court, Your Honor, but I have to tell you when we're
6 looking at close to ten decisions here that uniformly
7 are in favor of the landlord in this situation, Judge,
8 you would be the first, to my knowledge, to deviate
9 from that law. You would be the first to deviate as a
10 matter of law and the first to deviate based on this
11 contract.

12 Egate has relied on a number of contract
13 provisions that preclude the arguments that are being
14 made by LA. The reps and warranties claim Mr. Phelan
15 discussed off the record is still inapplicable and
16 irrelevant. I mean, these are general warranties and
17 reps about the authority to enter into the contract
18 that warranties and reps that as of the delivery date
19 of the premises, which was back in 2011, that certain
20 conditions were as they were. There's no warranty and
21 rep that the landlord would prevent a pandemic.

22 THE COURT: Anything else?

23 MR. HUJER: Judge, and unless you have
24 further questions, I think that we've succinctly and
25 kind of fully stated our position off the record. I'm

1 happy to go through it again if the Court would like or
2 if you have any questions, but to summarize, there is a
3 breach of this lease. The lease is terminated. It's
4 not coming back. There was no motion for summary
5 judgment, there was no motion for a Yellowstone
6 injunction, and LA has consented to your jurisdiction.
7 There is absolutely no reason under the law or in
8 equity to allow this proceeding to be drawn out any
9 further simply to reach the same result that we are
10 seeking here today. We are respectfully seeking an
11 order from Your Honor to recover the possession of the
12 premises inclusive of Egate's reasonable attorney's
13 fees and costs on this proceeding without prejudice to
14 its rights to seek damages separately.

15 THE COURT: All right. And the breach goes
16 back to April of last year, 2020?

17 MR. HUJER: That's right.

18 THE COURT: And you've also argued that
19 Section 761 of the Real Property Actions and
20 Proceedings Law is not applicable here relative to any
21 rights of redemption.

22 MR. HUJER: That's right. And I would draw
23 the Court's attention to the Yellowstone decision that
24 I mentioned. I mean, without a Yellowstone injunction,
25 there's nothing further to do here.

1 MR. ROSSI: Your Honor, if I may, this is
2 Will Rossi. Tristan referenced briefly, asked me if I
3 could jump in and give the citation for the Yellowstone
4 case.

5 THE COURT: Yes.

6 MR. ROSSI: It's 21 N.Y.2d 630. And I do
7 agree that that is the proper procedure for, you know,
8 gaining additional time to cure a right -- to cure a
9 breach of a commercial lease, and there are countless
10 decisions citing the Yellowstone decision for that
11 being the proper relief in the event you want to cure a
12 monetary default under a commercial lease. Thanks.

13 THE COURT: And that has not been done.

14 MR. ROSSI: That's correct.

15 MR. HUJER: That's right.

16 THE COURT: Mr. Phelan.

17 MR. PHELAN: Thank you, Your Honor. First of
18 all, Your Honor, what I will do is, I won't make
19 general representations or references or statements
20 about what I think the lease says because what I think
21 the lease says or what any of the counsel on this
22 hearing thinks the lease said really is immaterial.
23 What I will do is actually point you to Section 2.2 of
24 the lease, which begins, landlord's representations,
25 warranties and covenants. And it says, in

1 consideration for tenant entering into this lease. So
2 we know that the landlord was making these
3 representations as an inducement. And, in fact, the
4 very next clause says, and as inducement for tenant to
5 lease the premises, landlord makes the following
6 representations, warranties and covenants in addition
7 to such other representations, warranties and covenants
8 as may be contained elsewhere in the lease. So that's
9 the introductory clause. Now, do we think these are
10 material? Well, actually, the parties agree, because
11 the very next sentence says, each of which is material
12 and is being relied upon by the tenant. So we
13 understand by the very first sentence of 2.2 that these
14 are important promises being made by the landlord to
15 the tenants.

16 Now, Mr. Hujer said that these were only
17 applicable at the beginning of the lease, but how do we
18 know that's not the case? Well, it says, all of such
19 representations, warranties and covenants shall survive
20 the execution and the delivery of the lease by tenant
21 and landlord. So clearly the parties have now
22 evidenced an intention by the plain language of the
23 lease to abide by these promises and that they will
24 continue through the entire term of the lease, which
25 Mr. Hujer has reminded you is thirty-three years.

11

1 Then it says, just so that we're clear,
2 landlord shall indemnify defendant, hold harmless
3 tenant from and against any and all losses, demands,
4 claims, liabilities, damages, costs and expenses
5 arising as a result of any inaccuracy or breach of any
6 representation, warranty or covenant of landlord set
7 forth in this lease. That's the actual preamble to the
8 actual reps, warranties and covenants that are at issue
9 here.

10 Now, what did landlord represent, warrant and
11 covenant? Well, they said that they owned the property
12 and that their ownership would be free and clear of all
13 conditions and restrictions which might in any manner
14 or to any extent prevent or adversely affect the use of
15 the premises by tenant for tenant's intended purposes
16 or disturb tenant's peaceful and quiet possession and
17 enjoyment thereof.

18 Now, what do we know and what can the Court
19 take judicial notice of today? Well, what the Court
20 can take judicial notice of today is that, in or about
21 the middle of March 2020, Governor Cuomo ordered this
22 gym and every other gym in the State of New York to
23 close. Full stop. Not, you know, limit your hours,
24 not limit your capacity. Close. That was a
25 restriction. That restriction breached this rep, this

1 warranty, this covenant, which these parties put into
2 the lease. That's the actual language.

3 Now, if you have any question as to what the
4 parties' intended purpose for this lease was, all you
5 need do is go to 1.9 of the lease, which is entitled,
6 primary uses. It says, the primary uses of the
7 premises shall be for the operation of a full service
8 health club and fitness facility. So here, where the
9 Governor issues a restriction on our ability to use
10 this property as a fitness center, they're in breach of
11 2.2. And what we know from the Benderson case, and
12 perhaps maybe some of the individuals on this call
13 remember the case, I don't know, but we know from the
14 case of Benderson Development vs. Commenco Corporation,
15 44 A.D.2d 889, that the Court held that where a lease
16 contains express warranties, that the premises could be
17 used for a certain purpose and the premises could not
18 be used for that purpose, the tenant was excused from
19 its obligations under the lease. That is the law of
20 the State of New York.

21 Now, with respect to the Yellowstone case,
22 the Yellowstone case has nothing to do with
23 Section 761. 761 was enacted by the Legislature of the
24 State of New York and remains the law of the State of
25 New York. And what it says, where the special

1 proceeding is founded upon an allegation that a lessee
2 holds over after a default in the payment of rents.
3 Now, what the landlord has alleged here is one default
4 payment of rent. Full stop. There's no other defaults
5 out here. There are no other covenants that they've
6 suggested that we've breached. They've alleged that we
7 failed to pay rents. And the unexpired term of the
8 lease under which the premises are held exceeds five
9 years at the time when the warrant is issued, the
10 lessee, upon payment or tender, shall be entitled to
11 the possession of the demised premises under the lease
12 and may hold and enjoy the same, according to the terms
13 of the original demise. That's the law. Yellowstone
14 has nothing to do with this. We didn't seek a
15 Yellowstone injunction because we didn't need to. They
16 were already in breach of the lease. They were in
17 breach of their representations, warranties and
18 covenants, and they know this because they were
19 actually a party to the precedent that I'm citing to
20 you.

21 Now, as for frustration of purpose, what's
22 interesting is, if you go back and you look at all of
23 these ten or so cases, and believe me, having litigated
24 these cases across the country for the last eighteen
25 months, for every case the landlord can cite, I can

1 find you another one. Caffè Nero, Mattress King,
2 Cinemax, the Hintz case. All of them stand for the
3 exact opposite proposition the landlord has suggested
4 to you, that frustration of purpose doesn't exist. I
5 haven't cited them to you because they are also trial
6 court opinions. I've cited to you a binding appellate
7 court opinion. But in any event, were you to look at
8 the decisions that Mr. Hujer has made reference to,
9 without actually citing, just generally speaking that
10 there's this body of law out there, I can assure you
11 that in each one the tenant had the ability to use the
12 property and each one, to the extent that they were
13 closed, it was voluntary.

14 He made reference to the Gap case. The Gap
15 case concerned a Gap on the Upper East Side of New York
16 City, and what the law said was that -- or in this
17 particular case they could operate under a reduced
18 capacity. Gap felt that that wasn't profitable,
19 elected, elected to close. They closed voluntarily.
20 You know what we didn't do? We didn't do it
21 voluntarily. We closed eight hundred locations under
22 order of the Government, furloughed thirty-eight
23 thousand people, froze thousands upon thousands, if not
24 a million memberships, stopped collecting on subleases
25 because that was the right thing to do. Our subtenants

1 didn't have use of the property and therefore shouldn't
2 have to pay.

3 So all of this stands for the unique and
4 singular position which you should adopt, which is that
5 tenant under these circumstances, under this lease, not
6 under the Gap lease, not under the Equinox lease, not
7 under some other lease that's not before you, and I can
8 assure you that in the eight hundred or so leases that
9 I've looked at since the pandemic began, not one of
10 them is the same. Now, they may be similar, but not
11 one of them has identical provisions. So for him to
12 stand here and suggest to you that just because a trial
13 court somewhere else in the state or somewhere else in
14 the country interpreting a different document under
15 different facts somehow should guide your decision is
16 improper. What we know is the plain language of this
17 lease required us to have use and possession.

18 And when you look at this lease, what's
19 interesting is when you want to determine what was the
20 parties' intent here, all you have to do is look to
21 Section 15.3. Now, 15.3 deals with a casualty event.
22 Now, I know that there's been plenty of litigation,
23 it's not necessarily involved in this case at the
24 moment, but there's been plenty of litigation as to
25 whether or not under business interruption policies, et

1 cetera, COVID is a casualty and is otherwise
2 compensable. I'm not raising it for that reason,
3 Judge. I'm raising Section 15 of the lease because I
4 think it informs the Court as to the intention of the
5 parties. Namely, it says that in the event of damage
6 or destruction that otherwise interferes with the
7 tenant's right to use the property, this is what it
8 says. Tenant's obligation for payment of minimum rent
9 and other amounts owing from tenant to landlord
10 pursuant to the lease during the period the premises is
11 so rendered unfit shall be equitably abated from the
12 date of the casualty based upon the extent of the
13 interference resulting from such casualty.

14 So when you want to look to the lease and
15 say, you know, what were these parties thinking back in
16 2011, what would they have thought if tenants, for
17 whatever reason, and I think we can all agree that even
18 the day before the shutdown orders were issued, nobody
19 ever thought we would be here. Nobody could have
20 conceived of this global pandemic, this scope or the
21 duration. You know, I've been doing a lot of these
22 Zoom hearings, but I can tell you that this is a
23 novelty pre-pandemic. This would never have occurred.

24 So what were the parties thinking in the
25 event that tenant somehow was prevented from using this

1 property? Well, we know. Because in a similar
2 circumstance, the parties told you. They said, tenants
3 should have the right to abate rent when they can't use
4 the property. That's what the lease says. It's not
5 what I want it to say. It's actually what it does say.

6 Your Honor, there was no obligation to pay
7 rent during that period. I think the law is clear in
8 that regard. They have no right to current possession
9 of the property. I still think that the Court should
10 hold this over for cross-motions for summary judgment,
11 but in either event, I think you should deny the motion
12 and I appreciate the time.

13 THE COURT: All right. And so I'm clear, the
14 termination of the lease, as Mr. Hujer has argued, is
15 not accurate because your client had the right to not
16 pay rent based on the pandemic and --

17 MR. PHELAN: Right.

18 THE COURT: -- the Government's action.

19 MR. PHELAN: And Your Honor, we actually
20 wrote to them back in January, to Mr. Chait, who is on
21 the phone. I wrote the letter and specifically
22 rejected the termination and set forth the reasons why
23 we believed that rent was not due and owing. So we
24 don't believe that they properly terminated. We
25 believe that we have the right to possession of this

1 property and we think that this whole thing is an
2 exercise in futility in either event, either on the
3 merits or on application of 761, which has never been
4 addressed.

5 THE COURT: Now, Mr. Chait is present. He
6 represents the landlord or he did at the time you were
7 dealing with him back in January?

8 MR. PHELAN: Correct.

9 THE COURT: Mr. Chait, anything you wish to
10 say relative to that representation?

11 MR. HUJER: Judge, if I could start just
12 before Mr. Chait has a chance here. The letter
13 Mr. Phelan -- the letter Mr. Phelan cites to, I feel
14 like I have to continue to kind of bring the Court back
15 to the actual history of events here. A termination
16 notice was sent as of the date stated in the petition.
17 Mr. Phelan's letter long predated that. There was no
18 response to the operative termination notice here under
19 this lease. It's terminated.

20 But Mr. Chait, if you have -- if you have
21 something to say about the specific discussion, if any,
22 you might have had with Mr. Phelan, please proceed.

23 But Your Honor, I would like to be heard in
24 response to any other comments.

25 THE COURT: Well, let me ask you then.

1 You're the movant here.

2 MR. HUJER: Yes.

3 THE COURT: Do you believe that's even
4 relevant? That's not the termination of the lease.

5 MR. HUJER: No. I mean, it's a termination
6 of the lease. Look, we could do all sorts of things
7 here. I don't want to make it -- I don't want to make
8 jokes, but we could have a -- we could pound our fists,
9 stomp our feet, we could dance till the cows come home
10 here. The termination is the termination. It's over
11 under New York Law. There was no application for a
12 Yellowstone injunction to prevent this tenant from
13 being removed. We're here. We're properly before you.

14 THE COURT: I was just gonna ask Mr. Chait if
15 that was accurate that you were party to that letter
16 and you never responded.

17 MR. CHAIT: Your Honor, I believe, if I
18 remember correctly -- I'm not looking at the letter. I
19 did receive that letter, but I believe that was in
20 response to a prior default notice. I don't think it
21 was in response to the default notice that gave rise to
22 the lease termination or in fact to the lease
23 termination itself. I believe it was in response, I
24 think it was a January letter, and what's before Your
25 Honor are things that occurred subsequent to that time,

1 so to that extent.

2 And if I might add just briefly, Section 19.3
3 of the lease clearly gives landlord the right to
4 reenter the premises and remove property upon a summary
5 proceeding, so I think, you know, that's something that
6 I think we want to make clear.

7 And something else that just strikes me is
8 the argument about equitable abatement of rent is in
9 regard to a casualty, which this is certainly not a
10 casualty. And in the event of a casualty, there would
11 be insurance that would step in and pay that rent
12 during that period of loss. So I think that's just a
13 misapplied paragraph or section of the lease for what's
14 before Your Honor.

15 THE COURT: Mr. Hujer, anything else?

16 MR. HUJER: Yes. I -- Mr. Phelan's
17 represented that all -- that no lease is the same. I
18 mean, look, the courts still render decisions based on
19 different facts and different leases, but what the
20 Court should look at is the Kel Kim Corp case from the
21 Court of Appeals that recognizes explicitly that the
22 defenses LA has raised, they are narrow and they should
23 be construed in exceptionally narrow circumstances.
24 That jumping-off point here, when you start to peel
25 back the arguments and you look at the lease,

21

1 Section 2.2 of these warranties and representations,
2 the continuation of a warranty and rep after an
3 expiration of the lease doesn't make a warranty and rep
4 that is specific as to the time it was given continue
5 on indefinitely. It may preserve the ability of the
6 party in privity to sue for a breach after the
7 termination of the lease because the rep continues. It
8 doesn't expire with the termination of the lease.
9 That's the important point here.

10 2.2-b, which Mr. Phelan referenced regarding
11 free from liens, restrictions, encumbrances. We gotta
12 look at the language of the lease here and it's
13 specific to the landlord's title to the premises.
14 There's nothing that's happened to the landlord's title
15 to the premises. There's no allegation that anything
16 has happened to the landlord's title to the premises.

17 The Fourth Department case that Mr. Phelan
18 has referenced, again, it is usurped by the Yellowstone
19 case and it also references the fact that an unexpired
20 term of the lease is one of the facts in that scenario.
21 This lease is expired, the term is over, and they did
22 nothing to redeem the premises. You can't pay rent
23 after the lease has been terminated.

24 There's allegations in the answer about
25 conditions precedent, which I believe is what

1 Mr. Phelan is getting at here with these warranties and
2 reps, that they need to be satisfied before the
3 tenant's obligation to pay rent kicks in. But again,
4 let's leave the warranties and reps aside and let's go
5 to the quiet enjoyment provision, which is 22.1. It's
6 the reverse. It's upon the payment by tenant of the
7 rent and the observance and performance of all of the
8 agreements, covenants, terms and conditions on tenant's
9 part to be observed, tenant shall quietly enjoy.

10 We don't have a full payment of rent here.
11 They have no right to quiet enjoyment under this
12 situation. The use of the property is not solely for a
13 fitness club during the months of the pandemic in 2020.
14 The purpose of the lease is for the operation of maybe
15 a fitness club for thirty-three years. But again, if
16 you go to, Your Honor, 8.1, which I referenced off the
17 record, which it contemplates that the tenant doesn't
18 need to use the property as a fitness center, it needs
19 to pay rent. So being a fitness center is not the sole
20 purpose of this lease. And 8.2 actually allows the
21 tenant to change the use of the premises, but again,
22 provided it pays rent.

23 I think Mr. Chait has accurately discussed
24 the abatement provision. I mean, it's not just -- it's
25 a --

1 THE COURT: A casualty.

2 MR. HUJER: It's a casualty. But Judge, I
3 mean, it's not just that one word in the provision
4 that's casualty. It's there needs to be an
5 interference as a result of any damage or destruction.
6 And then the obligation to pay rent resumes following
7 completion of restoration work by the landlord here. I
8 mean, this is absolutely casualty property damage. The
9 building is flooded. You know, there's a -- you know,
10 a car goes through a plateglass window off hours, okay?
11 That's a casualty. The COVID-19 Pandemic is not. And
12 there was no rejection of the termination. As I've
13 stated, there was a default. My client sent a default
14 notice. There was no payment of rent. The lease has
15 been terminated.

16 THE COURT: Is it relevant at all that your
17 client continued to accept rent even though you've
18 argued that they're entitled to another fifteen percent
19 of that?

20 MR. HUJER: No, it's not. Here's the --

21 MR. CHAIT: May I step in, Your Honor? Each
22 and every month once we terminated the lease, we sent
23 the rent back to the tenant. So each and every month
24 after the lease termination, when they submitted the
25 check, we mailed the money back.

1 THE COURT: So as of May, you returned the
2 money?

3 MR. CHAIT: That's correct.

4 MR. PHELAN: That's not true, Your Honor.
5 Your Honor, we pay electronically.

6 MR. CHAIT: Then we mail it back. They pay
7 electronically, then we mail a check back.

8 MR. PHELAN: It didn't happen, Your Honor.

9 MR. CHAIT: Your Honor, I'll represent --

10 MR. PHELAN: Your Honor, none of those checks
11 have been cashed. None of those checks have been
12 cashed.

13 MR. CHAIT: That's true. We felt bad.

14 THE COURT: All right. Well, if they haven't
15 been cashed, they still haven't been paid because
16 petitioner didn't accept them. But you're saying since
17 the termination, you have not accepted any payment?

18 MR. CHAIT: We would mail a check back to
19 them, that's correct.

20 MR. PHELAN: Your Honor, so that we're clear,
21 we send it electronically. They don't reject the
22 electronic payment. They try to send a check back. We
23 have returned their checks. They have been paid. They
24 have the money for the months in question.

25 THE COURT: Anything else from you,

1 Mr. Phelan?

2 MR. PHELAN: Well, just real quickly, Your
3 Honor. You know, Mr. Hujer made reference to title.
4 Title, as we all know from first year property class,
5 is the word used for those bundle of rights that are
6 attendant with ownership of property. So when the
7 parties use the term "title," that's what they're
8 referring to. And in fact, what is made clear is when
9 they use the simple title to the portion of the
10 property owned by landlord, they're simply describing
11 that landlord owns the property, and then they make
12 reps, warranties and covenants regarding that
13 ownership. Right?

14 With respect to the quiet enjoyment and the
15 suggestion that we were in breach, remember that we
16 paid them on March 1st and we were forced to shut down
17 on March 17th, so they had been paid in full for the
18 month of March before there was any breach, rep,
19 warranty, before there was any issue. So they breached
20 first, and that's quite clear.

21 And then with respect to other uses, when you
22 look at a frustration of purpose argument, and this is
23 what the law says is you look at the tenant's purpose
24 at the inception of the lease, not whether or not they
25 can use it for other reasons. And frankly, we couldn't

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1 use it for other reasons. This is a specialty fifty
2 thousand square foot building with a pool and a
3 basketball court that frankly we couldn't have made
4 pizzas, we couldn't have done other things. We run
5 gyms. We weren't allowed to run the gym, so frankly,
6 they breached the lease first. Thank you.

7 THE COURT: All right. I'm going to take a
8 brief recess here. I want to check my notes and a
9 statute, and I'll come back and give you my ruling, all
10 right?

11 MR. PHELAN: Okay. Thank you.

12 THE COURT: Bear with me.

13 MR. HUJER: Thank you, Your Honor.

14 (A short recess was then taken.)

15 THE COURT: Back on the record. And I have
16 reviewed your papers and listened carefully to your
17 arguments. And I don't want to conflate RPAPL 761
18 with 711, but the relief requested reserving
19 petitioner's rights to commence a plenary action and
20 for monetary damages was for the Court to order the
21 respondent-tenant to vacate the premises and award
22 possession to the petitioner; of course, in broom clean
23 condition and the reservation of their other rights.
24 The respondent has opposed the relief and then raised
25 counterclaims. There's seven of them.

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1 The case law cited, of course, supports the
2 respective parties' positions, and notwithstanding the
3 many cases, including the Yellowstone case, and the
4 concession by Mr. Phelan that his client never asked
5 for a Yellowstone stay or rejected the termination -- I
6 reviewed that Fourth Department case, Benderson
7 Development Company vs. Commenco, C-O-M-M-E-N-C-O,
8 44 A.D.2d 889. It's been cited and given to the court
9 reporter for the cite for the record -- it seems to me
10 draconian that, based on what arose during the
11 pandemic, that the petitioner could unilaterally
12 terminate the lease or say the lease was terminated
13 based on what occurred, frustration of purpose, the
14 inability for the respondent to conduct its business as
15 intended.

16 So based on all of that, based on the
17 arguments of counsel, the case citations, the statutory
18 citations, I am denying the petition, the relief
19 requested.

20 What remains is the ability for the
21 petitioner to bring a plenary action for monetary
22 damages, and also the counterclaims survive. That's my
23 ruling.

24 Mr. Phelan, would you prepare an order for my
25 signature.

Kerry A. Meegan, CSR, NYRCR
Official Supreme Court Reporter

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1 So what we need to do is have a pretrial or
2 conference relative to the counterclaims and what the
3 intention of the petitioner is relative to a plenary
4 action.

5 MR. PHELAN: I will, Your Honor. Thank you.

6 THE COURT: All right. Off the record.

7 (Discussion held off the record.)

8 (PROCEEDINGS CONCLUDED.)

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11 C E R T I F I C A T I O N

12
13 The foregoing is certified to be a true and accurate
14 transcript of the official court reporter's minutes of the
15 virtual proceedings in the matter of Egate-95, LLC vs.
16 Fitness International, LLC.

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18 8/27/21 Kerry A. Meegan
DATE Kerry A. Meegan, CSR, NYRCR
Official Supreme Court Reporter

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